IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Berta v. Armstrong, 2007 NSSC 373

Date: 20071228
Docket: S.H. No. 182315
Registry: Halifax

Between:

Ilona Lynn Berta

Plaintiff

v.

Kim Armstrong and A. Lassonde Inc.

Defendants

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: August 28th, 2007 in Halifax, Nova Scotia

Oral Decision: October 19th, 2007

Written Release: December 28th, 2007

Counsel: Philip S. Gruchy for the Plaintiff
David P. S. Farrar, Q.C. for the Defendants

By the Court:

[1] This matter involves an application brought by the Defendants for an Order requiring the Plaintiff to disclose full particulars of the compensation that she received in relation to a 1998 motor vehicle accident.

[2] The Plaintiff in this action has been involved in a number of motor vehicle accidents. The first accident involved a rear-end collision that occurred on January 5th, 1998. According to the Plaintiff's discovery evidence, she suffered injuries to her neck, shoulders and upper back as a result of that collision. The Plaintiff commenced an action in the Supreme Court of Nova Scotia in relation to that accident which action was subsequently settled out of court.

[3] The Plaintiff was involved in a further rear-end collision on June 29th, 2000. According to the Plaintiff's discovery evidence, she re-injured her neck, shoulders and upper back as a result of that accident. On June 28th, 2002 the Plaintiff commenced this action which relates to the June 29th, 2000 motor vehicle accident. Both liability and damages are in issue in this proceeding.

[4] In August of 2006, the Plaintiff was involved in a further motor vehicle accident. That collision has no bearing on the matters in issue in this proceeding.

[5] The Plaintiff was discovered in relation to this action on March 15th, 2007. During the course of her discovery examination the Plaintiff was asked how much she received in compensation as a result of the January 5th, 1998 motor vehicle accident. On the advice of her solicitor, the Plaintiff refused to answer the question.

[6] The Defendants have now brought this application seeking (1) an Order requiring the Plaintiff to disclose the amount of compensation that she received in relation to the 1998 motor vehicle accident (2) a breakdown of the compensation that she received for each head of damage for which she was compensated as well as (3) copies of any settlement documentation relating to the settlement including any settlement agreement or release. The Defendants have confirmed that they are not seeking disclosure of any pre-settlement documents such as demand letters that may have been sent in relation to the January 5th, 1998 accident. Rather, they are seeking disclosure of the particulars of the settlement itself, including copies of any documents which confirm the terms of the settlement. The Plaintiff objects to the production of

this information suggesting that it is protected from production based on the doctrine of settlement privilege.

[7] The application before the court is brought pursuant to Civil Procedure Rules 18.09 and 18.12. Civil Procedure Rule 18.09(1) states:

> **Scope of examination**
>
> **18.09** (1) Unless it is otherwise ordered, a person, being examined upon an examination for discovery, shall answer any question within his knowledge or means of knowledge regarding any matter, **not privileged**, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings.
>
> [Emphasis added]

[8] Civil Procedure Rule 18.09(3) reads:

> (3) When any person examined for discovery omits to answer or answers insufficiently, the court may grant an order requiring him to answer or to answer further and give such other directions as are just.

[9] The Defendants take the position that the information requested from the Plaintiff is not privileged as a settlement has been reached in relation to the 1998 motor vehicle accident. They have referred the court to the Nova Scotia Court of Appeal decision in **Begg v. East Hants (Municipality) et al.** (1986), 75 N.S.R. (2d) 431, where Clarke, C.J.N.S., when dealing with the issue of whether a settlement had been reached, stated at ¶ 13:

> **[13]** Communications exchanged between solicitors on a without prejudice basis permit parties, through their solicitors, to conduct genuine and serious negotiations toward settlement. If a settlement is not achieved, then the parties can be confident that they will not be prejudiced by their exchanges being introduced as evidence at trial. However, once an unconditional and complete settlement is reached the privilege which hitherto existed is removed.

[10] Further, the Defendants have referred the court to the Manitoba Court of Appeal decision in **Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright** (1997), 120 Man.R. (2d) 214 (Q.B.), affirmed at (1998), 131 Man.R. (2d) 133 (C.A.). In that case, the court distinguished between pre-settlement negotiations/communications which the court indicated would be protected by privilege as a matter of public policy and a settlement agreement itself, which the court found was not privileged.

[11] Alternatively, the Defendants submit that if the requested information is privileged it should, nevertheless, be ordered to be produced based on an exception to the general rule which protects settlement documents from production. In particular, the Defendants suggest that the interests of justice require production in order to prevent the Plaintiff from being over-compensated for the same injury. The Defendants have referred the Court to a number of decisions in support of this position including **Pete v. Lanouette**, 2002 BCSC 75, and **Murray v. Hough**, 2002 BCSC 339. In addition, they have referred the Court to the cases of **Dos Santos**

(Committee of) v. Sun Life Assurance Co. of Canada, 2005 BCCA 4; **Hodgson v. Timmons**, 2006 NSSC 284, and **McMullin v. East Port Properties Ltd.**, 2006 NSSC 352.

[12] As indicated previously, the Plaintiff submits that the requested information is privileged. While she acknowledges that there are exceptions to the general rule protecting settlement documents from disclosure - she submits that the possibility of over-compensation does not warrant the court ordering production of this information. The Plaintiff has referred the court to a number of cases in support of her position including, *inter alia*, **Middelkamp et al. v. Fraser Valley Real Estate Board et al.** (1992), 71 B.C.L.R. (2d) 276 (B.C. C.A.); **Heritage Duty Free Shop Inc. v. Attorney General for Canada**, 2005 BCCA 188; **Hughes v. Roodenburg**, 2006 BCSC 282, and **Ursich v. Wilson**, 2004 YKSC 77.

[13] Both parties to this application agree that the information sought is relevant to the matters at issue in this proceeding. The issue is whether it is producible.

[14] The first question before me is whether the information sought is privileged. There are conflicting authorities in Canada on the issue of whether the terms of a

concluded settlement are *prima facie* protected from production based on the doctrine of settlement privilege (see for example: **Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright**, *supra*, which held that a concluded settlement agreement was not privileged. For a contrary view, see the British Columbia Court of Appeal decision in **British Columbia Children's Hospital v. Air Products Canada Ltd.**, 2003 BCCA 177. It is notable, however, that in this latter case the parties that had reached an agreement had also entered into a confidentiality agreement by which they agreed to keep the settlement agreement itself confidential unless ordered by a court of competent jurisdiction to disclose the same).

[15] One must be careful when reviewing the various authorities and texts to distinguish between pre-settlement communications and the terms of a concluded settlement. Many cases deal with pre-settlement communications which are often found to be protected from disclosure based on public policy. In particular - the desire to encourage settlement negotiations without fear of disclosure if those negotiations are unsuccessful. In my view, many of the public policy considerations that support a "blanket" or *prima facie* privilege in relation to pre-settlement communications do not come into play in relation to the terms of a concluded settlement.

[16] The second issue before me is whether the information sought is producible even if it is *prima facie* privileged. I intend to deal with this second question first.

CONCLUSION

[17] I have concluded that regardless of whether the information sought would *prima facie* be protected from production based on the doctrine of settlement privilege - it is appropriate and necessary in the circumstances of this case to grant the Order requested.

[18] It is well recognized in Canada that there are a number of exceptions to the doctrine of settlement privilege. In **Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada**, *supra*, the British Columbia Court of Appeal set out a general framework for exceptions to this form of privilege. At ¶ 17 of that decision Finch, C.J.B.C. stated:

> 17 In *Middelkamp*, *supra*, Chief Justice McEachern said there must be exceptions to the blanket privilege for settlement communications. Notably, he referred to ***the proper disposition of litigation*** (para. 20).
>
> [Emphasis added]

[19] At ¶ 20 of that same decision he stated:

> 20 To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both *relevant*, and *necessary in the circumstances of the case* to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice.
>
> [Emphasis in the original]

[20] Chief Justice Finch noted that the test for discharging the burden to establish an exception should not be set too low (see ¶ 19). However, he also indicated that when determining whether documents come within an exception to settlement privilege significant weight should be given to the just disposition of pending litigation (see ¶ 34).

[21] In **Heritage Duty Free Shop Inc. v. Attorney General for Canada**, *supra,* the British Columbia Court of Appeal stated that such exceptions are narrowly defined and seldom applied (¶ 25). Nevertheless, in appropriate circumstances exceptions to the application of settlement privilege are recognized.

[22] The case of **Pete v. Lanouette**, *supra,* dealt with one of those exceptions. That action arose out of a motor vehicle accident that occurred on September 10th, 1998.

The Plaintiff had also been involved in a previous accident that occurred in March of 1994. The Defendant sought an Order requiring production of information relating to the settlement of a prior action commenced in relation to the first accident. Mastor Bishop stated at ¶ 30 ".....there is a real possibility here that without the disclosure of the settlement documents and the information requested, the plaintiff could be compensated again for injuries for which she has already received compensation." The requested information was ordered to be disclosed.

[23] See also the decision of Master Horn in **Murray v. Hough**, *supra*.

[24] In my view, the interests of justice require an exception to the general rule relating to settlement privilege in situations where the Plaintiff may be over-compensated in damages if production is not ordered.

[25] In the case at Bar, the Plaintiff injured her neck, shoulders and upper back in the 1998 collision. She commenced an action in relation to that accident. The Plaintiff re-injured the same areas of her body in the June 29th, 2000 motor vehicle accident. She then settled the action relating to the 1998 collision. The Plaintiff's claim for damages in this present action is broad. In my view, the information

requested is both relevant and necessary in the circumstances of the case (see the comments of Finch, C.J. B.C. in **Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada**, *supra*) in order to avoid the possibility of double or over-recovery of damages.

[26] The Plaintiff has referred the Court to the cases of **Hughes v. Roodenburg**, *supra*, and **Ursich v. Wilson**, *supra*. In **Hughes v. Roodenburg**, *supra*, the Court refused to order production of both pre-settlement communications as well as correspondence and other documents relating to the terms of a resolution. That case is distinguishable from the case at Bar as in that case Master McCallum specifically found that it was not possible, based on the facts presented, for the Plaintiff to be compensated twice for the same injuries.

[27] In **Ursich v. Wilson**, *supra*, the court was also dealing with a Plaintiff who had been involved in two separate motor vehicle accidents. The Defendant applied to the court for an Order requiring the Plaintiff to disclose the details of a settlement reached in relation to the first motor vehicle accident. Gower, J. questioned the probative value of knowing the global amount of a settlement or of even knowing how the

settlement was broken down amongst various heads of damages. He found that the settlement details were privileged and were therefore not subject to disclosure.

[28] The Court in **Ursich**, *supra*, appears to have relied heavily on the British Columbia Court of Appeal decision in **British Columbia Children's Hospital v. Air Products Canada Ltd.**, *supra*. That case was decided in March of 2003. **Ursich**, *supra*, was decided in December, 2004. Since that time the British Columbia Court of Appeal decision was released in **Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada**, *supra*. I question whether Gower, J. would reach the same decision today in light of the **Dos Santos** decision. In any event, I am not bound by the **Ursich** decision and I choose not to follow it.

[29] As indicated above, in my view, the interests of justice require the disclosure of the information sought regardless of whether this information would be *prima facie* protected from disclosusre based on the doctrine of settlement privilege. The information requested is both relevant and necessary in the circumstances of this case in order to avoid the possibility of double or over-recovery of damages. In light of my conclusion in this regard, it is unnecessary for me to answer whether the information sought is *prima facie* privileged.

[30] During the course of the application the Defendants indicated that they would also be seeking a further discovery examination of the Plaintiff on these issues if their application was granted. Counsel for the Plaintiff did not consent to the production of the information requested but indicated that he had no difficulty with the Plaintiff participating in a further discovery examination if the court ordered production of the information sought. In light of my conclusion, I will also order that the Plaintiff will participate in a further discovery examination.

[31] The Plaintiff shall pay costs to the Defendants in the amount of $400.00 payable at the conclusion of the proceeding.

Deborah K. Smith
Associate Chief Justice